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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM—1953

No. 238

CHARLES B. McGEE,

Appellant,

vs.

STATE OF NORTH CAROLINA

APPEAL FROM THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

STATEMENT AS TO JURISDICTION

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SUPREME COURT OF NORTH CAROLINA

SPRING TERM, 1953

No. 508

STATE

vs.

CHARLES B. McGEE

ON APPEAL TO THE SUPREME COURT OF THE UNITED STATES

STATEMENT AS TO JURISDICTION

Appellant files his statement discussing the basis upon which he contends that Supreme Court of the United States has jurisdiction upon appeal to review the judgment in question pursuant to Rule 12(1) of the Rules of the Supreme Court of the United States, as amended April 6, 1942.

Opinion Below

The court below wrote an opinion which is reported in 237 N. C. 633, and the said opinion of the Supreme Court of North Carolina is made a part hereof, as Appendix A.

Question Presented

Does the prohibition in the ordinance of the City of Charlotte against exhibiting motion pictures for compensation

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between the hours of 6:30 p. m. and 9:00 p. m. o'clock on Sundays in said city in its purpose, on its face, and as construed, applied, and enforced amount to an unreasonable and unwarranted exercise of the police power; is said ordinance arbitrary, unreasonable, and discriminatory; does it unlawfully deprive defendant of his rights, liberties, and freedoms guaranteed by the due process clause of the Fourteenth Amendment and does it abridge the right of freedom of worship, in that it is an attempt to legislate respecting religion, contrary to the First and Fourteenth Amendments to the United States Constitution and Article I, Section 26, of the Constitution of the State of North Carolina.

The questions were raised by motion to dismiss and for judgment as of non-suit both at the conclusion of the State's evidence and of the defendant's evidence (5, 17).[1] These questions were adversely determined by the Supreme Court of North Carolina. The entire opinion of the Supreme Court of North Carolina is a part of this statement as to jurisdiction. See Appendix A at the end of this statement.

Statute Involved

This case draws into question the validity of an ordinance of the City of Charlotte, North Carolina, duly enacted June, 1941, as Chapter 19, Article 3, Section 46, of the Code of the City of Charlottee, reading as follows:

> Sunday Observance. It shall be unlawful to conduct, operate or engage in, or carry on within the City of Charlotte on the Sabbath Day, called "Sunday," any business except:
>
> Hotels, Restaurants and Boarding Houses, Drug

[1] Numbers appearing herein within brackets refer to the pages of the stenographic report of the proceedings at the trial in Superior Court of Mecklenburg County, North Carolina, filed in the Supreme Court of North Carolina record of the case.

Stores, Newspapers, and the Sale Thereof, Emergency Repair Service, Public Utilities, Including Street Railways, Gas, Telephones, Telegraph, and Radio, Railroads, Buses, Trucks, Taxicabs, Gasoline Service Stations, Refrigeration, Dairy Products, Bakeries, Magazine Stands, Ice and the Sale Thereof, Shoe Shine Parlors for the purpose of Shining Shoes only.

Or to engage in or operate any place of amusement, show, game or sport where a fee is charged for admission as a spectator, or to participate in any game, sport or amusement where an admission fee is charged, whether such admission fee be upon a club basis or otherwise, and it shall be unlawful to operate any poolroom or bowling alley in the City of Charlotte on Sunday: Provided, however, it shall be lawful on Sunday, between the hours of 1:30 P. M. and 6:30 P. M., Eastern Standard Time, and after the hour of 9:00 P. M., Eastern Standard Time, for persons, firms and corporations to open and operate, and charge a fee for admission as a spectator to motion picture and other theatres, tennis courts, squash courts, golf courses, swimming pools, baseball grounds, football grounds and outdoor athletic courts, parks and grounds, and it shall be lawful to participate in any amusement given or a game or sports played therein, regardless of whether or not a fee is charged for participating in such amusement, game or sport, or attending game as a spectator.

Constitutional Provisions Involved

Section 10, of Article I of the Constitution of the United States, relied upon in this case, reads as follows:

> "No State shall enter into any Treaty, Alliance, or Confederation; grant letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and Silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post fact Law or Law impairing the Obligation of Contracts, or grant any Title of Nobility."

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The First Amendment, relied upon in this case, reads as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The pertinent parts of the Fourteenth Amendment which appellant relies upon read as follows:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Matters Related to Jurisdiction

Timeliness

The judgment of the Supreme Court of North Carolina affirming the judgment of the Superior Court was entered May 6, 1953. See Appendix A containing the opinion of the Supreme Court of North Carolina. The judgment affirming the judgment of the trial court, therefore, became final on May 6, 1953. This appeal is duly presented and filed within the 90-day time limit after the judgment became final. The appeal is timely.

Nature of Case

This is a criminal case. It is an appeal from a judgment affirming a judgment of conviction on an appeal trial *de novo* in the Superior Court. The appellant was first proceeded against in the Recorder's Court of the City of Charlotte, North Carolina, by warrant. He was charged with violating the ordinance in question on the 8th day of Febru-

ary, 1953. The warrant among other things charged as follows:

> "W. S. Hucks, being duly sworn, complains and says that on or about the 8th day of February, 1953, Charles B. McGee with force and arms, at and in the County aforesaid and within the City Limits, did willfully, maliciously and unlawfully and feloniously did violate Article 3, Section 46, Chapter 19 of the Charlotte City Code by operating a motion picture theatre on Sunday, February 8, 1953, between the hours of 6:30 P. M. and 9:00 P. M., known as North 29 Drive-In Theatre, against the statutes in such case made and provided, against the peace and dignity of the State, and in violation of the City Ordinance, Section 46, Article 3, Chapter 19."

How Constitutional Question Raised

The constitutional question was raised in a motion to dismiss and for judgment as of non-suit made at the conclusion of the State's evidence and again at the conclusion of all the evidence in the Superior Court of Mecklenburg County, North Carolina (5, 17). The question presented in that court was considered and overruled (13, 17). Each holding of the trial court was presented on appeal to the Supreme Court of North Carolina and duly assigned as error (19). Each federal question presented upon this appeal also was presented to the Supreme Court of North Carolina in the brief, on oral argument. See Appendix A as to jurisdiction.

Statutory Provisions Sustaining Jurisdiction

Jurisdiction of the Supreme Court of the United States is invoked under Section 237 of the Judicial Code or 36 U. S. C. 1257 (a).

Under the Act of Congress of January 31, 1928, Chapter 14, 45 Stat. 54, and under the Act of Congress of April 26,

1928, Chapter 440, 45 Stat. 466, an appeal may be taken in any case which under prior statute could be received as a matter of right on writ of error. This case presents a state of facts within the jurisdiction of this court.

Statement of Case

The Proceedings

The appellant pleaded not guilty in the Recorder's Court of the City of Charlotte. He was found guilty and fined. He appealed to the Superior Court of Mecklenburg County. The case was tried in the Superior Court of Mecklenburg County on appeal from the Recorder's Court. The appellant pleaded not guilty (2). The case was tried by a jury and the judge (2). At the close of the State's evidence and again at the close of all the evidence a motion to dismiss and for judgment as of nonsuit were made (5, 17). At the February 23, 1953 Regular Criminal Term of the Superior Court of Mecklenburg County, the court rendered a judgment on the verdict convicting appellant (2). He was fined $10.00 and the costs (2).

The Facts

It was stipulated that on the 8th day of February, 1953, Officers W. S. Hucks and C. L. Ramsey, of the Charlotte Police Department, arrested the defendant Charles B. McGee and thereafter procured the issuance of a warrant, charging the defendant with violating Article 3, Section 46, Chapter 19, of the Code of the City of Charlotte, and that, at the time of the arrest, the defendant was engaged in the operation of a motion picture theater within the corporate limits of the City of Charlotte between the hours of 6:30 P. M. and 9:00 P. M. o'clock. It being further stipulated that the theater is known as "North 29 Drive-In Theater", and that the defendant was, at the time, the manager of said

theater and was personally present and in charge of said theater, and at the time mentioned in the warant, was manager of the theatre and was charging a fee for admission by the spectators.

North 29 Drive-In Theater was constructed and completed January 25, 1948. When it was finished and opened for business, it was outside the city limits of the City of Charlotte. Until recently, 1953, the theater was open each Sunday evening at 6:30 P. M., and up until February, 1953, there was no attempt to arrest the manager of North 29 Drive-In Theater or to attempt to close the theater prior to 9:00 o'clock on Sunday evenings.

At the present time there are other open-air theaters in the vicinity of Charlotte, but outside the city's limits, and these theaters are permitted to remain open on Sunday evenings between the hours of 6:30 and 9:00 P. M. North 29 Drive-In Theater was taken into the city limits at the time that the city limits were extended. The limits were extended in 1950, some time after the theater had been opened and in business.

The television station in Charlotte is known as WBTV. WBTV exhibits motion pictures over the airways through television sets between the hours of 6:30 and 9:00 o'clock P. M. on Sunday evenings. During those hours television sets owned by residents of Charlotte exhibit motion pictures received by those television sets and transmitted by a television station located inside the limits of the City of Charlotte. Part of these television programs are on film and are broadcast from film. On Sunday, February 8, 1953, between the hours of 6:30 and 9:00 P. M. o'clock, WBTV television station in the City of Charlotte was operating and exhibiting motion picture films. The projection studio of WBTV is in the Wilder Building in the heart of Charlotte. When WBTV exhibits a motion picture like "Hop-a-long Cassidy", they play that film in the Wilder Building, in the

studio. The television station is paid for showing these films and movies by the advertisers.

Part of North 29 Drive-In Theater is located within the limits of the City of Charlotte, and part of the theater is outside the limits and within the County of Mecklenburg. The box office, projection booth, and the screen are within the City of Charlotte.

North 29 Drive-In Theater purchased a license from the State of North Carolina, at a cost of $808.50, to operate the motion picture theater. This was State License Number 22,789, issued by the State of North Carolina, and covered one year, to wit, from June 1, 1952, to May 31, 1953, said license being received in evidence.

North 29 Drive-In Theater does only about fifteen per cent of its business after 9:00 P.M. Ordinarily when the theater is open prior to 9:00 o'clock there will be present about 400 cars, but on nights when the theater is opened at 9:00 o'clock, only about 45 or 50 cars are present. The great bulk of business is done before 9:00 o'clock on Sunday evenings. In order to make any money at all, it is necessary to have a good Saturday and Sunday attendance. Week days are not good. If deprived of operating this open-air theater between the hours of 6:30 P.M. and 9:00 P.M. on Sunday evenings, the continued operation of this open-air theater will be jeopardized. Operating costs are fixed. If compelled to close on Sunday evenings between the hours of 6:30 P.M. and 9:00 P.M., the company will suffer a very great loss. Films exhibited by this theater are rented. The theater is required to bid against the other theaters for the privilege of exhibiting pictures, and if prohibited from operating on Sunday evenings prior to 9:00 P.M. o'clock, the theater will not be able to compete with other theaters for the pictures.

Mr. William Hovis testified that he was a member of the

Council of the City of Charlotte in 1941, June of that year, when the city ordinance in question concerning the regulation of movies on Sunday was passed. He stated that the reason and purpose for prohibiting the opening of theaters prior to 1:30 P.M. and between the hours of 6:30 P.M. and 9:00 P.M. on Sundays was time set aside when theaters would have to close so that the churches would not have to compete with the theaters. Theaters were prohibited in the morning hours and the evening hours during "church hours". Mr. Hovis further testified that at the time of the passage of the ordinance, the Council conducted hearings and arrived at a legislative policy about the hours that these businesses, enumerated in the ordinance, could be open on Sunday. The vote of the Council supported the policy that it was advisable not to permit these types of organizations and businesses to operate during the hours which were prohibited. They were put in there "primarily during the church hours."

The Questions Are Substantial

The Ordinance Violates Religious Freedom

The decision in this case strikes at the great principle once again announced in *McCollum* v. *Board of Education*, 333 US 203, and this city ordinance represents another attempt by a legislative body to enact rules of law covering the conduct of its citizens in matters respecting their religious liberties. When stripped of its superficial cloak, the underlying intent, purpose, and operation of the ordinance in the case at bar are precisely the same as those in the *McCollum Case*. In the latter case, Mr. Justice Black, speaking for the Court, stated that there was an attempt to afford sectarian groups an invaluable aid in helping to provide pupils for their religious classes through use of the state's compulsory public school machinery. And the

court stated that this is not separation of church and state. In the case at bar, the objective and the operation of the city ordinance is precisely the same. In the *McCollum Case*, the pupil was not required, against his wishes, to attend the religious classes, but, as pointed out by the court, it was nevertheless an attempt to force an individual to attend classes in religion. In our case the ordinance of the City of Charlotte has for its purpose the same objective, namely, by the closing of motion picture houses, among other things, during church hours, it seeks to drive citizens into the churches. As has so often been pointed out by both our state and federal courts, such an objective is not only invalid as a matter of law, but it is a course of action not to be desired by the churches, and is not one to promote the welfare of the churches. Our churches thrive on the freedom of choice of the individual and the people and not through force or compulsion.

Again, in the *McCollum Case*, Mr. Justice Frankfurter, at page 227, *supra*, points out another objection to such ordinance and statutes:

> "Again, while the Champaign School population represents only a fraction of the more than two hundred and fifty sects of the nation, not even all the practicing sects in Champaign are willing or able to provide religious instruction. The children belonging to these non-participating sects will thus have inculcated in them a feeling of separatism when the school should be the training ground for habits of community, or they will have religious instruction in a faith which is not that of their parents. As a result the public school system of Champaign actively furthers inculcation in the religious tenets of some faiths, and in the process sharpens the consciousness of religious differences, at least among some of the children committed to its care. These are consequences not amenable to statistics, but

> they are precisely the consequences against which the constitution was directed when it prohibited the Government common to all from becoming embroiled, however innocently, in the destructive religious conflicts of which the history of even this country records some dark passages."

It has been argued that the court will not inquire into the motives of the legislature if the statute appears on its face to be valid. That is a general rule; it is not the duty of the court to inquire whether members of a legislative body, in the enactment of legislation, had ulterior motives, whether bribes were accepted, whether it was intended to benefit a certain individual, and so on. This is a general rule having no application to the case at bar. The rule of law applicable to the ordinance now before the court is the rule providing that the court will take cognizance of legislative motives and purpose to the extent that they can be determined either from the face of the act or may be inferable from its operation. *Minnesota* v. *Barber*, 136 U. S. 313. To say that one cannot gain the intent of this ordinance to eliminate competition between churches and theaters, among other things, from the language of the ordinance would require one to close his eyes to all his experience in life. Even if Councilman Hovis had not testified that the purpose of closing the theaters at the two periods on Sunday was to eliminate the competition between the churches and theaters, one would know from the words of the act itself that the hours set aside had the sole purpose to help "to provide pupils for their religious classes". The courts take notice of matters of such common knowledge. *City of Harlan* v. *Scott*, 290 Ky. 585, 162 SW 2d 8. In the *McCollum Case*, it was sought to provide pupils through use of the state's compulsory public school machinery; in the case now before the court, it was through the use of

the state's compulsory criminal code. This is not separation of church and state.

The court in passing upon the constitutionality of a law may always inquire into its history and may consider, among other things, discussions of the legislative body concerning the law. *Broden's Farm Products Co.* v. *Baldwin*, 293 U. S. 194.

It has been repeatedly held, both by the federal courts and by the state courts, that the only ground upon which Sunday laws can be sustained is that, pursuant to the police power, the state may require a cessation of labor one day in seven for the welfare of men and to protect the masses from being worn out by continuous labor. It is equally fundamental that no law can require a cessation of labor for religious purposes. *Hennington* v. *Georgia*, 163 U. S. 299; *Petit* v. *Minnesota*, 177 U. S. 164; *Rodman* v. *Robinson*, 134 NC 503.

In the *Rodman* case, supra, Chief Justice Clark spoke emphatically in the following words:

> "If the observance of Sunday were commanded by statute as an act of religion or worship, such statute would be absolutely forbidden. *Under Our Constitutions, Both State And Federal, No Act Can Be Required Or Forbidden By Statute Because Such Act May Be In Accordance With Or Against The Religious Views Of Anyone.* The first amendment to the Federal Constitution provides, 'Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof,' and the Constitution of this State (Article 1, Section 26) reads: 'All men have a natural and inalienable right to worship Almighty God according to the dictates of their own consciences, and no human authority should in any case whatsoever control or interfere with the right of conscience.'
>
> "*If, therefore, the cessation of labor or the prohibi-*

tion or performance of any act were provided by statute for religious reasons, the statute could not be maintained. The only ground upon which Sunday laws can be sustained is that, in pursuance of the police power, the State can and ought to require a cessation of labor upon specified days to protect the masses from being worn out by incessent and unremitting toil. If such days happen to be those upon which the larger part of the people observe a cessation of toil for religious reasons, it is not an objection, but a convenience.

"If it was presumption in Uzza to put forth his hand to stay the tottering Ark of God at the threshing floor of Ghidon, *It is equally forbidden under our severance or church and state for the civil power to enforce cessation of work upon the Lord's Day in maintenance of any religious views in regard to its proper observance.* That must be left to the consciences of men as they are severally influenced by their religious instructions." (Emphasis supplied.)

In *Everson* v. *Board of Education*, 330 U. S. 1 (1947), Mr. Justice Black stated:

"The First Amendment, as made applicable to the States by the Fourteenth Amendment, commands that a state shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. These words of the First Amendment reflected in the minds of early Americans presents a vivid mental picture of conditions and practices which they fervently wished to stamp out in order to preserve liberty for themselves and for their posterity.

"The 'establishment of religion' clause of the First Amendment means at least this: neither a State nor the Federal Government can set up a church. *Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.* Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion." (Emphasis supplied.)

In the *McCollum* case, Mr. Justice Black stated:

> "In the words of Jefferson, the clause against establishment of religion by law was intended to erect a wall of separation between Church and State—For the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere. Or, as we said in the Everson case, the First Amendment has erected a wall between church and State which must be kept high and impregnable."

In the same case, Mr. Justice Frankfurter stated:

> "The great American principle of eternal separation . . . is one of the vital reliances of our constitutional system for assuring unities amount our people stronger than our diversities. It is the Court's duty to enforce this principle in its full integrity. We renew our conviction that we have staked the very existence of our country on the faith that complete separation between the State and religion is best for the State and best for religion."

The Court is considering one of the greatest principles of our democratic way of life, namely, religious freedom; a freedom for which men have fought and died through the centuries. The First Amendment to the United States Constitution was adopted by the founders of this nation to preserve religious liberty. The founding fathers decided that the best way to protect religious liberty was to erect a wall between Church and State. An ordinance which forces a business to close during church hours of any religious denomination on Sunday for the purpose of encouraging attendance at church services, constitutes a breach in the wall of separation between Church and State. It is for the Courts to guard and protect that wall. If that is its purpose, the ordinance must fall.

Mr. Justice Denny, in writing the decision of the Supreme Court of North Carolina in this case says in effect that even though it is conceded that the hours selected were to encourage attendance at religious services, that nevertheless the ordinance would stand. Of couse no one would seriously argue that the disclosed intent and purpose of the act, and its operation, was other than to close theaters during church hours; it was not for the rest and good health of the citizens. Actually the hours selected for closing the theaters were those in which people would be least apt to rest—those immediately preceding the time at which even the earliest retirers go to bed, and those immediately following a night of rest. The churches have their services during these hours for the same reason also—the hours when fewest are resting. Once it is admitted that the sole purpose of the ordinance was to assure the churches the largest possible audience, then the ordinance must fall. In this democratic nation and, one of the reasons for its birth, is the concept, freedom and primacy of the individual—not the state nor the church. And, as our landmark judicial decisions, both state and Federal, have set forth, herding does not redound to the benefit of the churches any more than it does to the polling booth. It is the method of the sometime well-intention but thoughtless, and of the sometime evil. But it has never been a solution, and it never will be. *McCollum* v. *Board of Education, supra.*

The Ordinance Is Unreasonable and Arbitrary and Denies Appellant Equal Protection

The appellant further challenges the Sunday observance ordinance of the City of Charlotte on the ground that it is arbitrary, unreasonable, and discriminatory; that said ordinance unlawfully deprives the appellant of his rights, liberty and freedom, and of his property without due process of law; and that the ordinance denies the appellant

the equal protection of the laws; all in violation of the Fourteenth Amendment to the United States Constitution, and Article I, Section 17, of the North Carolina Constitution.

It is fundamental rule under our law that an ordinance must affect all persons similarly situated or engaged in the same business without discrimination. Where there is a classification of businesses in an ordinance, it must be founded upon reasonable distinctions and have some reasonable relation to public peace, welfare, and safety. *Borden's Farm Products Co.* v. *Baldwin, supra; Jay Burns Baking Co.* v. *Bryan*, 264 U. S. 504; *F. S. Royster Guano Co.* v. *Commonwealth of Virginia*, 253 U. S. 412; *State* v. *Trantham, supra; Suddreth* v. *Charlotte*, 223 NC 630, 27 SE 2d 650; 50 AM. Jur., *Sundays and Holidays*, Sec. 11; *Arrigo* v. *City of Lincoln*, 48 NW 2d 643 (Neb.).

In *State* v. *Trantham, supra*, the Court stated:

> "The one requirement is that the ordinance must affect all persons similarly situated or engaged in the same business without discrimination. Only those ordinances which discriminate between those of a particular group or class who are similarly situated with reference to the subject matter of the legislation come within the constitutional inhibitions . . . *No competitor of his has been accorded a privilege which is denied him.*" (Emphasis supplied.)

The Charlotte Sunday observance ordinance entirely exempts "radio" from any restrictions. As a result of modern scientific development, radio stations are now able to exhibit motion pictures by transmitting both sound and pictures through the air for exhibition on television screens in residences and other places. The evidence in the case before the Court proved, without contradiction, that Station WBTV transmits from a studio within the heart of Charlotte motion picture films between the hours of 6:30 p. m.

and 9:00 p. m. on Sundays, the hours the City would have the appellant prohibited from exhibiting motion pictures in his outdoor theatre (R. p. 14). It would be interesting to know what action the City would take in the case of a motion picture theatre exhibiting a television program during the prohibited hours. The ordinance in question does not prohibit the operation of radio stations within the City of Charlotte at any hour on Sunday. The radio station started to transmit motion pictures after the ordinance was adopted. These radio stations, therefore, are permitted to do the very thing the City would prohibit the defendant from doing. The regular motion picture theatres are in direct competition with the television station. So great is the competition that it is known to all that there is now a life-and-death struggle on the part of those who exhibit motion pictures in theatres to survive the competition of the television stations. And, under the Charlotte ordinance, at the very hour that the defendant is required to close his doors during church hours, the television station runs on, exhibiting motion pictures to the public for pay, the very same Hollywood productions exhibited by the defendant. The only difference is that the person paying the exhibitor in one case is the patron, and in the case of the television programs, it is the advertiser. Eventually, of course, the patron pays the advertiser because the consumer must bear the cost. The appellant contends *That a competitor of his, the television station in Charlotte has been accorded a privilege which is denied him*, to wit, the exhibition of motion pictures between 6:30 p. m. and 9:00 p. m. on Sunday evenings. The classification is not founded upon a real and reasonable distinction. To make the claim that there is a reasonable distinction in the eyes of the law fits into the category of a distinction without difference. The classification must rest upon some ground of difference having a fair and substantial relation to the object of the

legislation so that all persons similarly circumstanced shall be treated alike. *Royster Guano Co.* v. *Virginia, supra.*

The cases require that there be a reasonable and substantial relation between the restriction applied and the end to be attained, namely, the promotion of public peace, welfare and safety, because the liberties of men cannot be arbitrarily invaded under the guise of the police power. *Liggett Co.* v. *Baldridge,* 278 U. S. 105; *Rhodes, Inc.* v. *Raleigh,* 217 NC 267, 9 SE 2d 389; *White's Appeal,* 287 Pa. 259, 134 A. 409; *City of Harlan* v. *Scott, supra.*

In the *Liggett* case, *supra,* a statute provided that all stockholders in a drugstore must be pharmacists. The court in declaring the statute unconstitutional, first noted that in modern times capital to operate our economy comes from many contributors not engaged in the business and that, therefore, to require one not engaged in the preparation and dispensing of drugs to be a pharmacist was unreasonable. The Court very properly held that a state cannot, under the guise of protecting the public, arbitrarily interfere with private business and impose unreasonable or unnecessary restrictions thereon.

The Kentucky Court has pointed out the unreasonableness of a statute requiring motion picture theaters to close after 6:00 p. m. on Sundays. *City of Harlan* v. *Scott, supra.* There the Court stated that a statute having for its purpose provision of Sunday as a day of rest was reasonable and valid. But, if the purpose was a religious one then the statute would be invalid. Regulation of a business, if it is to be sustained, must be reasonable. Closing of theaters at 6:00 p. m. on Sundays could not have for its purpose provision of rest for the citizens. It had for its purpose matters of religion, not preservation of the public health, morals, safety, or welfare of the people, and was, therefore, unreasonable, arbitrary, and being so was held unconstitutional. The court took judicial notice of the fact that

the hours after 6:00 p. m. were the most profitable for theaters, and, also, that closing the theaters after 6:00 p. m. would tend to encourage attendance at devine services but that such regulatory legislation could not be and never had been, upheld on religious grounds.

In *Rhodes, Inc.* v. *Raleigh, supra*, involving parking meters, based on the authority to regulate traffic, the Court stated:

> "There must be some reasonable relation between the restriction applied and the condition sought to be remedied, otherwise the restriction must be held to be invalid."

As previously noted, the only legal ground for closing a business on Sunday is to promote the welfare of men by assuring a day's rest from continuous labor; so the condition to be remedied is continuous toil. *State* v. *Suncrest Lumber Co., supra.* Of course that has been remedied in our time by the various state and Federal wage and hour limitations. The restriction applied in our ordinance is closing theatres during certain hours on Sunday. Under this ordinance, if it is to be justified, the City would have the day of rest sliced up—you need rest in the morning, you need not rest in the afternoon, you need rest between 6:30 p. m. and 9:00 p. m., and you need not rest after 9:00 p. m. Under this ordinance, a multitude of businesses are exempted: for example, men can make and sell dairy, bakery, and ice products, and operate gasoline stations, magazine stands, shoe-shine parlors, and drugstores. The patrons in the city can attend open air theaters outside the city limits at any hour. Men operate television and radio stations and people listen to and watch them at all hours. In short, there is no reasonable relation between the restriction applied and the end to be attained, because the end is a religious purpose and such purpose is unconstitutional.

Not only must the classification be reasonable and the purpose a legitimate one, but, also, the operation of the statute must be reasonably calculated to attain its objective. This requirement was clearly illustrated in two cases decided by the Court. In each case, superficially, the purpose was a most laudatory one, to protect the purchaser of bread, to assure him money's worth in weight. Nevertheless, in the first, *Jay Burns Baking Co.* v. *Bryan*, 264 U. S. 504, the Court struck down the statute because the restrictions imposed were unreasonable and not calculated in their operation to attain the objective, protection of the purchaser. In the second case, *Peterson Baking Co.* v. *Bryan*, 290 U. S. 570, involving a similar statute, the act was upheld since in its operation, the restrictions were reasonable and did tend to protect the purchaser.

In the case at bar, admitting that attendance at divine services will be encouraged, can it be said that the citizens will secure more rest and their health and morals improved by closing the theaters from 6:30 p. m. to 9:00 p. m., keeping in mind that during these prohibited hours the movie programs are coming into the living rooms and restaurants. The statute would seem to do more than favor those economically able to own a television set or to patronize a restaurant.

A test applied by the Court in determining constitutionality is to ask a question. What sound, logical ground is there for making the distinction and classification? If there is none, the classification is unreasonable and arbitrary. *F. S. Royster Guano Co.* v. *Commonwealth of Virginia, supra.*

The legislature may not, under the guise of classification, impose discriminatory or burdensome measures upon a particular industry or business, which has no vital or reasonable relation to the objects sought by a just and per-

missible classification. *Gulf C. & S. S. R. Company* v. *Ellis*, 165 U. S. 150.

The present trend of the law is indicated in 50 AM. JUR., *Sundays and Holidays*, Sec. 11, page 811, as follows:

> "And while in the majority of the older cases statutes which prohibited the following of certain occupations only, or after general prohibitory provisions, excepted certain occupations and callings from the operation of the statute, have been sustained. *The tendency of the more recent cases is to hold such statutes invalid as being discriminatory or constituting class legislation.*" (Emphasis supplied.)

The appellant is entitled to question the constitutionality of the ordinance because he is included in the class against which there has been a discrimination. Further, the alleged discriminatory provisions operate to the detriment and harm of the appellant and adversely affect his rights. The evidence conclusively proved that if the defendant is compelled to close between the hours of 6:30 p. m. and 9:00 p. m. on Sunday evenings, he would suffer severe economic loss (R. p. 15). *State* v. *Trantham*, *supra*. To subject this business to this drastic regulation will destroy it, and when such regulation has no constitutional objective, but an unconstitutional one, religion, then it becomes unreasonable and arbitrary and must fall. *McFarland* v. *American Sugar Refining Co.*, 241 U. S. 79.

The appellant notes the case of *State* v. *Weddington*, 188 NC 643, 125 SE 257, where the Court upheld an ordinance prohibiting the sale of Coca-Colas on Sunday, in which the Court stated:

> "The defendant's position is now without force because the suggested exception strongly appeals to the common judgment of men as being meet and proper under such conditions, but it must be remembered that

> we are dealing with the exercise of an unquestioned police power and *Whether it transcends the bounds of reason*—not with its wisdom or in policy." (Emphasis supplied.)

The defendant contends that an ordinance which compels him to close his open-air theatre between 6:30 p. m. and 9:00 p. m. on Sunday evenings *Transcends the bounds of reason.* The defendant cries out that under existing laws it is not evil nor unlawful for men to work in and others to attend a motion picture theatre on Sunday between 1:30 p. m. and 6:30 p. m. and after 9:00 p. m., within the City of Charlotte; and it is not evil nor unlawful for men to work in and others to attend outdoor motion picture theatres outside of the City of Charlotte at any hour on Sunday (R. p. 13); that it is not evil nor unlawful for the residents of Charlotte to watch motion pictures in their living-rooms transmitted from a studio within the City of Charlotte at any hour on Sunday; yet the ordinance in question says that it is evil and unlawful to operate and to view motion pictures at the defendant's open-air theatre between the hours of 6:30 p. m. and 9:00 p. m. on Sundays. Such a law not only lacks wisdom, but also transcends the bounds of reason and becomes arbitrary and discriminatory. *Royster Guano Co.* v. *Virginia*, 253 U. S. 412.

Conclusion

Appellant prays that the Court note jurisdiction of this cause for final hearing upon the question involved in accordance with the rules of the Court, because the court below has disposed of an important and substantial federal question in a way that is in conflict with the Constitution of the United States and the accepted s d course of judicial procedure calls for exercise by the Supreme Court of the

United States of its power of supervision and review to halt the same.

Respectfully submitted,

MAURICE A. WEINSTEIN,
Liberty Life Building,
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Counsel for Appellant.

APPENDIX "A"

IN THE SUPREME COURT OF NORTH CAROLINA

SPRING TERM, 1953

No. 508—Mecklenburg

STATE

v.

CHARLES B. McGEE

Appeal by defendant from Pless, J., February Term, 1953, of Mecklenburg

Criminal prosecution on a warrant charging the violation of a city ordinance.

The defendant was tried and convicted in the Recorder's Court of the City of Charlotte, and from the judgment imposed, appealed to the Superior Court.

Section 46, Article 3, Chapter 19 of the Code of the City of Charlotte reads as follows:

> "It shall be unlawful to conduct, operate or engage in, or carry on within the City of Charlotte on the Sabbath Day, called "Sunday," any business except:
>
> Hotels, Restaurants and Boarding Houses, Drug Stores, Newspapers, and the Sale Thereof, Emergency Repair Service, Public Utilities, Including Street Railways, Gas, Telephone, Telegraph and Radio, Railroads, Buses, Trucks, Taxicabs, Gasoline Service Stations, Refrigeration, Dairy Products, Bakeries, Magazine Stands, Ice and the Sale Thereof, Shoe Shine Parlors for the Purpose of Shining Shoes only.
>
> "Or to engage in or operate any place of amusement, show, game or sport where a fee is charged for admission as a spectator, or to participate in any game, sport or amusement where an admission fee is charged, whether such admission fee be upon a club basis or

otherwise, and it shall be unlawful to operate any pool-room or bowling alley in the City of Charlotte on Sunday: Provided, however, it shall be lawful on Sunday, between the hours of 1:30 P. M. and 6:30 P. M., Eastern Standard Time, and after the hour of 9 P. M., Eastern Standard Time, for persons, firms and corporations to open and operate, and charge a fee for admission as a spectator to motion picture and other theatres, tennis courts, squash courts, golf courses, swimming pools, baseball grounds, football grounds and outdoor athletic courts, parks and grounds, and it shall be lawful to participate in any amusement given or game or sports played therein, regardless of whether or not a fee is charged for participating in such amusement, game or sport, or attending same as a spectator."

It was stipulated that on 8 February, 1953, police officers of the City of Charlotte arrested the defendant, Charles B. McGee, and thereafter procured the issuance of a warrant, charging him with violating the above ordinance. That at the time of the arrest, the defendant was engaged in the operation of a motion picture theatre within the corporate limits of the City of Charlotte between the hours of 6:30 p. m. and 9:00 p. m. It was further stipulated, that the theatre is known as "North 29 Drive-In Theatre," and that the defendant was, at the time, the manager of the said theatre and was personally present and in charge thereof; and at the time mentioned in the warrant, the defendant McGee, as manager of the theatre was charging a fee for admission by spectators.

At the close of the State's evidence, counsel for defendant moved for judgment as of nonsuit on the following grounds:

(1) That the City of Charlotte has no authority to enact or enforce the ordinance in question, under the grant of powers to it by the General Assembly of North Carolina.

(2) That the ordinance is unconstitutional and void, for that it is an unreasonable and unwarranted exercise of the police power; that it is arbitrary, unreasonable, and discriminatory, and unlawfully deprives the defendant of his rights, liberties, and freedoms guaranteed by the due

process clause of the Fourteenth Amendment of the Constitution of the United States, and by Article I, Section 17 of the Constitution of North Carolina.

(3) That the ordinance is void in that it offends the First Amendment to the Constitution of the United States, and Article I, Section 26 of the Constitution of North Carolina in that it is an attempt to legislate respecting religion.

The motion was denied. It was likewise denied upon its renewal at the close of all the evidence.

The jury returned a verdict of guilty and from the judgment imposed thereon, the defendant appeals, assigning error.

Richard M. Welling and Maurice A. Weinstein, attorneys for defendant, appellant.

Attorney General McMullan, Asst. Attorney General Love, and Gerald F. White, Member of Staff, for the State.

DENNY, *J.*:

The right of a municipality to enact and enforce ordinances relative to the observance of Sunday must be delegated, if it exists, by the Legislature. Municipal corporations have no inherent police powers and can exercise only those conferred by statute. Kass v. Hedgepeth, 226 NC 405, 38 SE 2d 164; Rhodes, Inc. v. Raleigh, 217 NC 627, 9 SE 2d 389; S. v. Dannenberg, 150 NC 799, 63 SE 946; S. v. Ray, 131 NC 814, 42 SE 960; McQuillin, Municipal Corporations, Third Edition, Volume 6, Section 24.189, page 768, et seq. It is well settled, in view of the increasing scope of municipal power for the benefit of the public that the police power is as extensive as may be required for the protection of the public health, safety, morals and general welfare of the people. Turner v. New Bern, 187 NC 541, 122 SE 469, citing Camfield v. United States, 167 US 518, 42 L. ed. 260, and Bacon v. Walker, 204 US 311, 51 L. ed. 499. Likewise, in Moore v. Greensboro, 191 NC 592, 132 SE 565, this Court said: "The enforcement of police regulations is a governmental function, * * * and it has been said that upon the exercise of this power depend the life, safety, health, morals, and the comfort of the citizen, the enjoyment of private and social life, the beneficial use of property, and

the security of social order. Slaughterhouse cases, 16 Wall, 62."

The power to enact ordinances requiring the observance of Sunday has been delegated to municipalities of the State by GS 160-52, GS 160-200 (6) (7) (10); and in addition to these general powers granted to all municipalities of the State, the Charter of the City of Charlotte, being Chapter 366 of the Public-Local Laws of 1939, provides in section 32, that, "In addition to the powers now or hereafter granted to municipalities under the general laws of the State of North Carolina, the City of Charlotte shall have and retain those express powers granted to it by Section 48 and the subsections thereof of Chapter 342 of the Private Laws of 1907 which, together with certain other additional powers hereby granted to said city are as follows: (13) To pass ordinances for the due observance of Sunday and for the maintenance of order in the vicinity of churches and schools."

The defendant contends, however, that the powers granted in the above statutes to enact and enforce the observance of Sunday have been withdrawn from all municipalities in the State by the repeal of GS 103-1 by Chapter 73 of the Session Laws of 1951. Section 1 of this act is in the following language: "GS 103-1 is hereby repealed in its entirety." Section 2 of the act reads as follows: "All laws and clauses of laws in conflict with this Act are hereby repealed." It is contended that since GS 160-52 provides that the governing body of a municipality "shall have power to make ordinances, rules and regulations for the better government of the town, not inconsistent with this chapter and *the law of the land* (italics ours), as they may deem necessary; and may enforce them by imposing penalties on such as violate them; and may compel the performance of the duties imposed upon others, by suitable penalties," the repeal of GS 103-1 makes any and all ordinances with respect to the observance of Sunday contrary to "the law of the land." In other words, the defendant insists that by the repeal of GS 103-1, which was originally adopted in 1741, forbidding work in ordinary callings on Sunday, the State established a new policy with respect to Sunday labor and the conduct of business enterprises on that day.

It should be kept in mind that a violation of GS 103-1, while it was in force, did not constitute an indictable offense but made the violator subject to a pecuniary fine or penalty, recoverable by summary proceeding before a justice of the peace. S. v. Williams, 26 NC 400; S. v. Brooksbank, 28 NC 73; Rodman v. Robinson, 134 NC 503, 47 SE 19, 65 LRA 682, 101 Am. St. Rep. 877. Moreover, while this statute was in effect it was held not to be in conflict with ordinances enacted by municipalities requiring the observance of Sunday. S. v. Medlin, 170 NC 682, 86 SE 597; S. v. Davis, 171 NC 809, 89 SE 40.

Ruffin, C. J., in the case of S. v. Williams, supra, in pointing out that a violation of the Act of 1741 (subsequently codified as GS 103-1) did not constitute an indictable offense, made this observation: "The Legislature has hitherto thought the penalties given in the Act of 1741, sustained by public sentiment, adequate securities for the decent observance of the day. The event has, upon the whole, justified that opinion. * * * For even the few persons whose own principles, as moral and religious persons, might not have restrained them from the profanation of the day have been restrained by a willingness to obey the law as enacted in the statute of 1741, or by a just respect for the opinions and feelings of their fellow-citizens, to whom, as a body, secular labor on Sunday is a scandal and offense." This statute had been in effect for 103 years when Chief Justice Ruffin made his observation. However, 107 years later it had become apparent that the statute was no longer effective as a deterrent to the profanation of the Sabbath. In fact for many years prior to its repeal it had been almost completely ignored. But its repeal in no sense should be construed as a legislative intent to place the stamp of approval upon the profanation of the Sabbath. To the contrary, in addition to the ineffectiveness of the act, its repeal may have been motivated by the fact that the more effective method of enforcing measures for the observance of Sunday is to make the violation thereof an indictable offense. And the fact that the Legislature has passed no state-wide act on this subject since the repeal of the 1741 Act (GS 103-1), does no impair the police powers heretofore granted

to municipalities to adopt ordinances requiring observance of Sunday. For, after all, the need for regulation in this respect is usually within areas embraced within the corporate limits of our towns and cities, rather than in the rural areas of the State.

Therefore, we hold that neither the repeal of GS 103-1 nor the provision with respect to the repeal of all laws and clauses of laws in conflict therewith, have the effect of repealing police powers granted to municipalities by GS 160-52 and GS 160-200 (6) (7) (10), and to the City of Charlotte in its Charter.

Municipal ordinances prohibiting the pursuit of all occupations generally on Sunday, except those of necessity or charity, have been uniformly held constitutional in this jurisdiction. S. v. Weddington, 188 NC 643, 125 SE 257, 37 ALR 573; S. v. Burbage, 172 NC 876, 89 SE 795; S. v. Davis, supra; S. v. Medlin, supra. This view seems to be in accord with the decisions generally throughout this country. Hennington v. Ga., 163 US 299, 41 L. ed. 166; Petit v. Minn., 177 US 164, 44 L. ed. 716; Rosenbaum v. City & County of Denver, 102 Colo. 530, 81 P 2d 760; S. v. Cranston, 59 Idaho 561, 85 P 2d 682; City of Harlan v. Scott, 290 Ky. 585, 162 SW 2d 8; Ex parte Johnson, 77 Okla. Cr. App. 360, 141 P 2d 599; Broadbent v. Gibson, 105 Utah 53, 140 P 2d 939; Ex parte Johnson, 20 Okla. Cr. App. 66, 201 P 533; Komen v. City of St. Louis, 316 Mo. 9, 289 SW 838; Anno. 29 ALR 402; McQuillin, Municipal Corporations, Third Edition, Volume 6, Section 24.188, page 767; 50 Am. Jur., Sundays & Holidays, Section 9, page 808.

Consequently, we hold that the ordinance of the City of Charlotte, now under attack, is not invalid for lack of power in its governing body to enact or enforce any ordinance requiring the observance of Sunday.

The second reason assigned upon which the defendant challenges the validity of the ordinance is on the ground that it is arbitrary, unreasonable, and discriminatory; that it deprives him of his rights, liberties, freedoms and property without due process of law; and denies him the equal protection of the law; all in violation of the due process clause of the Fourteenth Amendment to the Constitution of

the United States, and Article I, section 17, of the Constitution of this State.

It is a fundamental rule that the governing body of a municipality, clothed with power to enact and enforce ordinances for the observance of Sunday, "is vested with discretion in determining the kinds of pursuits, occupations, or businesses to be included or excluded, and its determination will not be interfered with by the courts provided the classification and discrimination made are founded upon reasonable distinctions and have some reasonable relation to the public peace, welfare, and safety." 50 Am. Jur., Sundays & Holidays, section 11, page 810.

Barnhill, J., in speaking for this Court in S. v. Trantham, 230 NC 641, 55 SE 2d 198, said: "Legislative bodies may distinguish, select, and classify objects of legislation. It suffices if the classification is practical. Magoin v. Bank, 170 US 283, 42 L. ed. 1037; S. v. Davis, supra. They may prescribe different regulations for different classes, and discrimination as between classes is not such as to invalidate the legislative enactment. Smith v. Wilkins, 164 NC 135, 80 SE 168. The very idea of classification is inequality, so that inequality in no manner determines the matter of constitutionality. Bickett v. Tax Commission, 177 NC 433, 99 SE 415; R. R. v. Matthews, 174 US 96, 43 L. ed. 909. The one requirement is that the ordinance must affect all persons similarly situated or engaged in the same business without discrimination. City of Springfield v. Smith, 322 Mo. 1129."

The defendant does not claim that the ordinance discriminates against him in so far as it applies to any other person or persons similarly situated and engaged in the theatre business. But he insists the ordinance is invalid because during the hours from 6:30 p.m. to 9:00 p.m. on Sunday, while he is not permitted to operate his Drive-In theatre, it permits radio and television stations to operate in the City of Charlotte.

In our opinion, the operation of a motion picture theatre is an entirely different business from that of operating a radio or television station, and these operations may be placed in different classifications. Moreover, the ordinance

forbids the operating, during certain hours, of any place of amusement, or the conducting of any show, game, or sport where a fee is charged for admission as a spectator, or a fee is charged to participate in any game, sport or amusement. No fee is required to be paid before one can listen to his radio or watch a television show. There is no merit in the contention that the ordinance is discriminatory in this respect.

We now consider whether it is arbitrary and unreasonable. Ordinances of this character cannot be upheld if arbitrary and unreasonable, but must rest upon a reasonable exercise of existing police power. In 50 Am. Jur., Sundays & Holidays, section 9, page 808, it is said: "According to the present view, Sunday laws are based on the experience of mankind as to the wisdom and necessity, for both the physical and moral welfare of man, of having at stated intervals a day of rest from customary labor. Consequently, such laws have been uniformly recognized as a legitimate exercise of the police power. Since the purpose of Sunday statutes is to promote the physical and moral nature of man, the right to prohibit secular pursuits on Sunday is not affected by the fact that they may be noiseless and harmless in themselves."

In McQuillin, Municipal Corporations, Third Edition, Volume 6, section 24.189, page 768, et seq., the author says: "It has been said that laws and ordinances respecting Sunday observance clearly are within the genius of our institutions and the spirit of our national life. * * * The majority rule is that municipal competence to regulate Sunday observance and prohibit certain businesses and activities on that day or during certain hours on Sunday may be predicated on the municipal police, general or public welfare power. A Sunday regulation is designed to conserve the peace, good order and health by compelling a day of rest each week, and it may be sustained as a measure contributing to public morality." This same author, in his work on municipal corporations, same edition, Volume 7, section 24.218, page 45, says: "Ordinances forbidding, or regulating the time of operation of, theatres, or the showing of motion pictures on Sunday have been

upheld as constitutional and valid. The enactment of such an ordinance is within the municipal police power. Such an ordinance is authorized by delegated power to regulate motion picture shows," citing West Coast Theatres v. Pomono, 68 Cal. App. 763, 230 P 225; Ames v. Gerbracht, 194 Iowa 267, 189 NW 729; City of West Monroe v. Newell, 163 La. 409, 111 So. 889; Power v. Nordstrom, 150 Minn. 228, 184 NW 967; Ex parte Johnson, supra (201 P 533); Blackledge v. Jones, 170 Okla. 563, 41 P 2d 649; Hicks v. City or Dublin, 56 Ga. App. 63, 191 SE 659.

In S. v. Medlin, supra, the Town of Zebulon had adopted an ordinance which prohibited keeping any shop or store open on Sunday for the purpose of buying and selling (except ice), but provided that "drug stores may be kept open at all times on Sunday for the sale of drugs and medicines; and from 6 to 9:30 o'clock in the morning and from 1 to 4:30 o'clock in the afternoon, for the sale of drugs, medicines, mineral waters, soft drinks, cigars and tobacco only." The defendant who did not operate a drug store, opened his grocery store between the hours of 6 and 8 o'clock a.m., on Sunday, 18 January, 1915, while the above ordinance was in full force and effect, and sold cigars, cigarettes and Coca-Cola to several purchasers and received cash payments therefor. At this same time, a drug store in Zebulon was open for the sale of these same articles. The Court said: "This ordinance, which prohibits keeping open stores and other places of business for the purpose of buying or selling, except ice, drugs and medicines, and permits the drug stores to sell soft drinks and tobacco for a limited time in the morning and afternoon, as a convenience to public customs, is not an unreasonable exercise of the police power. Neither does it cover the same ground as Revisal, 2836 (later codified as GS 103-1). Such local regulations are within the powers conferred on town authorities in their exercise of the police power, and if not satisfactory to the community such regulations will doubtless be changed at the instance of their constituents or by the election of a new board of commissioners. Public sentiment in this regard varies in different localities, and the power of making these local regulations is simply an exer-

cise of 'home rule,' which is wisely vested in the town commissioners to conform to the sense of public decency and peace and order, which is observed by compliance with the sentiments of their constituents. Such regulations are neither already provided by the general law nor are they forbidden by any statute." This decision has been followed and cited with approval in S. v. Davis, supra; S. v. Burbage, supra; Lawrence v. Nissen, 173 NC 359, 91 SE 1036; S. v. Kirkpatrick, 179 NC 747, 103 SE 65; S. v. Weddington, 188 NC 643, 125 SE 257, 37 ALR 573.

In the case of S. v. Weddington, supra, the facts were that the governing authorities of the Town of Faith enacted an ordinance providing, "that it shall be unlawful for any person or persons, merchants, tradesmen or company to sell or offer for sale on Sunday any goods, wares, drinks or merchandise of any kind or character, except in case of sickness or absolate necessity, in the town of Faith." The defendant, a restaurant operator, sold a Coca-Cola as a part of a lunch. It was urged on appeal to this Court that the ordinance was unreasonable, oppressive, in derogation of common right, and to this extent should be declared void and of no effect, as transcending the bounds of a reasonable exercise of the police power of the Town of Faith. Stacy, J. (later Chief Justice), in speaking for the Court in upholding the ordinance, said: "The defendant's position is not without force, because the suggested exception strongly appeals to the common judgment of men as being meet and proper under such conditions, but it must be remembered that we are dealing with the exercise of an unquestioned police power, and whether it transcends the bounds of reason—not with its wisdom or impolicy. S. v. Vanhook, 182 NC 831; S. v. Austin, 114 NC 857. The peculiar conditions and evils to be remedied in the town of Faith can best be understood by the commissioners of that town, and the courts are permitted to check their acts only when they are palpably unreasonable and oppressive."

The ordinance under consideration not only applies to picture shows, but to other theatres, tennis courts, squash courts, golf courses, swimming pools, baseball games, football games, and other outdoor athletic courts, parks, etc.

The City of Charlotte permits all these places of amusement and sports activities, which are operated or conducted for private gain, to operate or be conducted between the hours of 1:30 p.m. and 6:30 p.m. on Sunday, but to close from 6:30 p.m. to 9:00 p.m. For all practical purposes, this closes substantially all these places of amusement except theatres, and prevents the sport activities, except to a very limited extent, after 6:30 p.m. Doubtless, very few people care to play tennis or squash after 9:00 p.m.; no baseball or football games are ordinarily scheduled to begin after 9:00 p.m. on Sunday. Certainly golf would not be played after that hour. And except in extremely warm weather, it is doubtful that swimming pools could attract sufficient patronage after 9:00 p.m. to justify their remaining open.

After all, the governing body of the City of Charlotte has determined in the exercise of its police power that certain classified places of amusement may be operated and certain designated sports activities may be held or participated in within the City of Charlotte from 1:30 p.m. to 6:30 p.m., and after 9:00 p.m. on Sunday. And in view of the many secular pursuits sought to be regulated, coupled with the fact that the local town and city authorities are in a position to know the peculiar conditions and evils that need to be regulated in their respective municipalities, we do not think the provisions of the ordinance under consideration, with respect to the hours of regulation, may be held arbitrary and unreasonable. S. v. Medlin, supra; S. v. Weddington, supra.

Furthermore, the mere fact that the defendant operates an outdoor theatre and may be unable to exhibit more than one show on Sunday, is insufficient to sustain his contention that the ordinance deprives him of his constitutional rights without due process of law.

The defendant has certainly not shown that the ordinance is "palpably unreasonable and oppressive." S. v. Weddington, supra; Komen v. City of St. Louis, supra (ordinance requiring bakeries to close after 9:00 a.m. on Sunday, held valid); Ex parte Johnson, supra (201 P 533, held the regulation or prohibition of Sunday amusements, including moving picture shows, not unconstitutional);

Hicks v. City of Dublin, supra (upheld ordinance limiting the time motion picture shows could be open on Sunday); Richman v. Bd. of Commissioners of City of Newark, 122 N.J.L. 180, 4 A 2d 501 (upheld an ordinance prohibiting the sale of groceries on Sunday between the hours of 1:00 p.m. and 12:00 o'clock midnight).

We now consider the final question raised by the defendant. Does the fact that most of the churches in the City of Charlotte have religious services at some hour between 6:30 p.m. and 9:00 p.m. on Sunday, make the ordinance subject to successful attack as offending the First Amendment of the Constitution of the United States and Article I, Section 26, of the Constitution of this State? Conceding that the governing body of the City of Charlotte may have taken this fact into consideration in determining the hours during which places of amusement would be permitted to open on Sunday, this does not perforce mean that the ordinance was not enacted pursuant to the legitimate exercise of the police power. We have numerous provisions in our statutes prohibiting the establishment of various business activities near churches. The influence that led to the enactment of those measures was the respect and consideration the legislators had for churches as religious institutions, and the wholesome influence they exert in their respective communities; but the power to enact those measures was derived from civil authority and not from religious motives or considerations. Clark, C. J., in speaking for this Court in Rodman v. Robinson, supra, said: "It is incorrect to say that Christianity is a part of the common law of the land, however it may be in England, where there is union of church and state, which is forbidden here. The beautiful and divine precepts of the Nazarene do influence the conduct of our people and individuals, and are felt in legislation and in every department of activity. They profoundly impress and shape our civilization. But it is by this influence that it acts, and not because it is a part of the organic law, which expressly denies religion any place in the supervision or control of secular affairs."

In our opinion, the ordinance is not subject to attack on the ground assigned. There is nothing in it that offends the

First Amendment of the Constitution of the United States, or that attempts to interfere with the natural and inalienable right of man to worship Almighty God according to the dictates of his own conscience, as vouchsafed to all citizens in Article I, Section 26, of our State Constitution. The ordinance contains no provision that may be construed as impinging upon the freedom of conscience. It neither purports to compel nor deny the observance of any religious duty.

It so happens that the great majority of people desire to observe Sunday as the day of rest. And measures for its observance do not come from a desire to impose upon the conscience of any individual, but rather to promote the public health, the general welfare, safety and morals of the people and to give them an opportunity to rest from their secular activities.

Long before civil governments undertook to exercise their police power to enforce the observance of Sunday as a means of promoting the public health, the general welfare, safety, and morals of the people, Christians had chosen this day in commemoration of the Resurrection, in lieu of the Old Testament Sabbath which fell on Saturday. And the fact that an ordinance may require the cessation of secular pursuits on Sunday during the hours in which churchgoing people usually attend religious services, will not be held unconstitutional, if otherwise reasonable and valid.

After a careful consideration of the questions raised on the record, and the authorities bearing thereon, we are of the opinion that the challenged ordinance is constitutional and, therefore, the verdict below must be upheld.

No error.

A true copy (ILLEGIBLE), Clerk of the Supreme Court of North Carolina.

[Seal.]

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HAROLD B. WILLEY, Cler

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 238

CHARLES B. McGEE,

Appellant,

vs.

STATE OF NORTH CAROLINA

APPEAL FROM THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

PETITION FOR REHEARING

MAURICE A. WEINSTEIN,
RICHARD M. WELLING,
Counsel for Appellant.

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APPEAL FROM THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

PETITION FOR REHEARING

The appellant herein does hereby petition the Supreme Court of the United States pursuant to Rule 33 of the Rules of the Supreme Court of the United States, for a rehearing of the appeal of the appellant, which appeal was dismissed for want of a substantial federal question by order dated the 12th day of October, 1953, on the following grounds:

1. That the appeal herein presented the following question:

Does the prohibition in the ordinance of the City of Charlotte against exhibiting motion pictures for compensation between the hours of 6:30 p. m. and 9:00 p. m. o'clock on

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Sundays in said city in its purpose, on its face, and as construed, applied, and enforced amount to an unreasonable and unwarranted exercise of the police power; is said ordinance arbitrary, unreasonable, and discriminatory; does it unlawfully deprive defendant of his rights, liberties, and freedoms guaranteed by the due process clause of the Fourteenth Amendment and does it abridge the right of freedom of worship, in that it is an attempt to legislate respecting religion, contrary to the First and Fourteenth Amendments to the United States Constitution.

2. That the Supreme Court of North Carolina has decided a federal question of substance in this case not heretofore determined by the Supreme Court of the United States.

3. That the Supreme Court of North Carolina has decided an important question of federal law, which has not been, but should be, settled by the Supreme Court of the United States.

4. That the Supreme Court of North Carolina has rendered a decision herein that is in conflict with a decision of the Supreme Court of Kentucky in a similar case presenting substantially the same facts. In the case of *City of Harlan* v. *Scott*, 290 Ky. 585, 162 S. W. (2) 8 (1942), the Supreme Court of Kentucky held as follows:

> "While Sunday prohibitory laws have a religious origin, they are held constitutional not on religious grounds but only upon the theory that the establishment of a compulsory day of rest is a legitimate exercise of the police power, and the inhibition is against laboring, or causing employees to engage in labor, on Sunday, not against the business itself.
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> "The remaining question then is as to the validity of an ordinance prohibiting operation during certain hours on Sunday. In considering this question Sunday must be regarded as any other day since, as pointed out, no prohibition on religious grounds is sus-

tainable. The question then is, may city ordinances forbid the operation of a picture show on any day or days of the week after 6:00 P. M. This, of course, depends on whether such a regulation is reasonable or arbitrary—regulation of hours for the conduct of a legitimate business must be reasonable and may not be rested upon assumed or imaginary grounds for which there is no foundation and, to be sustainable, any regulation of a legitimate business must tend in some degree towards the preservation of the public health, morals, safety, or welfare of the people.—We are unable to imagine how the closing of shows at 6:00 P. M. on any particular day of the week would tend in any degree towards the prevention of offenses or the preservation of health, morals, safety, or welfare of the people. A closing at this hour on Sunday might tend to encourage attendance at divine services, but, as heretofore indicated, such regulatory or prohibitive legislation has never been upheld on religious grounds."

5. That the uncontradicted evidence as shown in the statement as to jurisdiction proved beyond all doubt that the stated purpose of the ordinance in question was to close the place of business of the appellant on religious grounds, all contrary to the First Amendment of the Constitution of of the United States as made applicable to the states by the Fourteenth Amendment.

6. That the decision of the Supreme Court of North Carolina herein has decided a federal question in conflict with *McCollum* v. *Board of Education*, 333 U. S. 203, and in conflict with the principles laid down by the Supreme Court of the United States in the case of *Everson v. Board of Education*, 330 U. S. 1.

7. That the ordinance involved presents a substantial federal question in that said ordinance deprives the appellant of his rights, liberty, and freedom, and of his property without due process of law; and that said ordinance denies the appellant the equal protection of the laws, all in viola-

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tion of the Fourteenth Amendment of the Constitution of the United States.

8. That the Chief Justice of the Supreme Court of North Carolina, on the 27th day of July, 1953, allowed the appeal herein to the Supreme Court of the United States.

WHEREFORE, the appellant prays the Court that it rehear its order of dismissal herein and find that a substantial federal question is involved, and further prays that the judgment of the Supreme Court of North Carolina herein, be reviewed by the Supreme Court of the United States, and that same be reversed.

Respectfully submitted,

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By RICHARD M. WELLING,
Law Building,
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Counsel for Appellant.

October 26, 1953.

Certificate

We, the undersigned, being counsel for the appellant herein, do hereby certify that the foregoing petition is presented in good faith and not for purposes of delay.

MAURICE A. WEINSTEIN,
RICHARD M. WELLING,
Counsel for Appellant.

No. 238. McGee *v.* North Carolina. Appeal from the Supreme Court of North Carolina. *Per Curiam:* The

appeal is dismissed for want of a substantial federal question. *Maurice A. Weinstein* and *Richard M. Welling* for appellant. Reported below: 237 N. C. 633, 75 S. E. 2d 783.